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CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

David MacMillan and Cynthia Barrett Martin,
Debtor(s)

Case No.: 2:16-bk-21559-NB

Chapter: 7

Substantively Consolidated with
Case No.: 2:17-bk-11588-NB

Attitude Marketing, Inc.,

Debtor(s)

Jointly Administered with
Case No.: 2:19-bk-10552-NB

Chapter: 7

Wyndham Vacation Resorts, Inc.,

Plaintiff(s)

Adv. No.: 2:17-ap-01229-NB
Jointly Administered with
Adv. No.: 2:17-ap-01551-NB

v.

David MacMillan,

Defendant(s)

**MEMORANDUM DECISION RE: (A) FEE
AWARD AND (B) ORAL MOTION TO
ENFORCE WRITTEN ORDER AND
COMPEL PRODUCTION OF GENERAL
LEDGER**

Wyndham Vacation Resorts, Inc.,

Plaintiff(s)

Hearings:
Dates: 4/9/19, 5/21/19, 6/4/19, 7/30/19,
8/6/19, 8/20/19, 9/24/19
Place: Courtroom 1545
255 E. Temple Street
Los Angeles, CA 90012

v.

Cynthia Barrett Martin,

Defendant(s)

For the reasons set forth below, this Court awards Wyndham \$9,425.00 in sanctions and orders Aston Business Solutions, Inc. (“Aston” or “ABS”) to pay that amount and produce its general ledger.

1. BACKGROUND

On April 7, 2017 Wyndham Vacation Resorts, Inc. (“Wyndham”) initiated this adversary proceeding by filing a complaint against the above-captioned debtor, David MacMillan (“MacMillan”), asserting claims for relief under Sections 523(a)(2)(A), (a)(4), (a)(6), and 727.¹ Adv. No. (2:17-ap-01229-NB, “Wynd-Mac-Adv.”), dkt. 6. On January 31, 2018 this Court entered an order authorizing the joint administration of this proceeding with a pending non-dischargeability proceeding Wyndham filed against MacMillan’s wife, Cynthia Martin (“Martin”) (Adv. No. 2:17-ap-01551-NB, “Wynd-Martin-Adv.”). Wynd-MacM-Adv. dkt. 26; Wynd-Martin-Adv. dkt. 9. On January 11, 2019 Wyndham filed its first amended complaint against both MacMillan and Martin. Wynd-Mac-Adv. dkt. 71.

On or about October 20, 2018, Wyndham issued a subpoena to third-party Aston for the production of documents and a deposition pursuant to Rule 9016 (incorporating Civil Rule 45) (the “First Subpoena”). See Wynd-Mac-Adv. dkt. 134, p. 4:5-9. Aston did not move to quash the First Subpoena. *Id.*, p. 4:9-10.

On or about February 28, 2019, Wyndham issued a second subpoena to Aston seeking additional documents (the “Second Subpoena,” and together with the First Subpoena, the “Subpoenas”). See Wynd-Mac-Adv. dkt. 134, p.4:11-13. On March 11, 2019, Aston filed a motion to quash (Wynd-Mac-Adv. dkt. 84) (the “Motion to Quash”). Wyndham opposed the Motion to Quash. Wynd-Mac-Adv. dkt. 93.

In advance of the April 9, 2019 hearing on the Motion to Quash, this Court issued the following tentative ruling:

¹ Unless the context suggests otherwise, a “chapter” or “section” (“§”) refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the “Code”), a “Rule” means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, and the parties’ filed papers.

Tentative Ruling for 4/9/19:

Deny the motion to quash (with the possible exception of one aspect), address procedural issues, and then continue this Status Conference, all as set forth below. Appearances required.

Current issues:

(a) Procedures

* * *

(b) Motion to Quash (adv. dkt. 84)

The tentative ruling is that the motion to quash (adv. dkt. 84) by Aston Business Solutions, Inc. ["Aston"] is unpersuasive, except perhaps for limitations as to time, which the parties are directed to address at the hearing.

* * *

(A) Analysis re motion to quash

[Aston] asserts only vague objections:

(1) Competitors?

[Aston] asserts that it and Plaintiff are competitors. How so?

The motion does not even disclose [Aston's] business. Is it a timeshare owner? Is it a timeshare operator? Is it something else? (As noted below, this Court expects that it has gleaned the answer from other documents, but the tentative ruling is that this lack of even such basic information in the motion is fatal to this argument.)

(2) Protected information?

[Aston] alleges that some sort of trade secrets or other confidential, privileged, or other type of protected information is involved. What sort of information? Why would a traditional privilege log and other tools be inadequate?

[Aston] complains that parties in interest in this bankruptcy case have shared information. But [Aston] fails to point to any prohibition on sharing information.

(3) Burden?

[Aston] alleges that the requested discovery is unduly burdensome. How so? Is it stored in thousands of boxes of paper files that are difficult to reach and review for some reason?

(4) Vagueness and [overbreadth]?

[Aston] alleges that the discovery requests are vague and overbroad. How so? ABS fails to provide any explanation or evidence to support this allegations.

(5) Discussion

Based on a question (not an answer) in excerpts from the deposition of [Aston's] President and shareholder, Glenn Chaffin, [Aston] may be a marketing company for "timeshare exit companies." Adv. dkt. 84, Ex.1 (Depo. Tr. 1/24/19), p.95:22-23. But how does that make [Aston] a "competitor" of Plaintiff, with information that would constitute trade

1 secrets, as opposed to a [facilitator] of (possibly) legitimate ways to exit
2 timeshares, who sends out non-secret flyers and other publicly known
3 marketing materials, and assists timeshare members in navigating
4 contracts that are known to all the parties?

5 Such a facilitator theoretically could benefit Plaintiff, by replacing
6 non-paying or troubled members with paying ones - unless, of course,
7 [Aston] engages in acts that improperly interfere with contractual relations
8 or otherwise assists in the wrongdoing of which Plaintiff accuses
9 Defendants. Plaintiff's discovery appears to be targeted at discovering
10 information that could lead to admissible evidence on this and other
11 relevant issues. Accordingly, the discovery appears to be entirely proper
12 and appropriate, with the possible exception of the movant's request to
13 impose some limitations as to time, which the parties are directed to
14 address at the hearing.

15 After consideration of oral arguments, this Court orally adopted the tentative
16 ruling as the final ruling (with no limitations on the discovery as to time) and denied the
17 Motion to Quash. On May 24, 2019, this Court entered its written order denying the
18 Motion to Quash. Wynd-Mac-Adv. dkt. 120.

19 On May 14, 2019, Wyndham filed a *Motion to Compel Aston Business Solutions,*
20 *Inc., to Produce Documents and Related Relief* (Wynd-Mac-Adv. dkt. 104, 105) (the
21 "Motion to Compel"). In connection with the Motion to Compel, this Court issued an
22 *Order to Show Cause* directing Aston "and its principals, its counsel of record in this
23 adversary proceeding, and its person most knowledgeable about the subject matter of
24 the subpoenas described [therein]" to appear and show cause why this Court should not
25 hold Aston in contempt for failing to produce certain documents or otherwise comply
26 with the Subpoenas (Wynd-Mac-Adv. dkt. 107) (the "OSC"). On May 20, 2019, Aston
27 filed its response to the OSC. Wynd-Mac-Adv. dkt. 110, 111. On May 30, 2019,
28 Wyndham filed its reply. Wynd-Mac-Adv. dkt. 122.

At a hearing on June 4, 2019, this Court granted the Motion to Compel and set a
deadline of June 10, 2019 for Aston to produce all documents responsive to the
Subpoenas. On June 6, 2019, this Court entered its order on the Motion to Compel,
which, among other things, ordered Aston to pay Wyndham's fees incurred in

1 connection with the Motion to Compel and set a June 14, 2019 deadline for Wyndham
2 to submit a schedule of its fees. Wynd-Mac-Adv. dkt. 125.

3 On June 14, 2019, Wyndham submitted a timely declaration in support of its fees
4 (Wynd-Mac-Adv. dkt. 128) (the “Eliades Declaration”). On June 20, 2019, this Court
5 issued an order (Wynd-Mac-Adv. dkt. 130) directing Aston to file and serve any
6 response to the Eliades Declaration by no later than July 3, 2019. *Id.* The order further
7 provided that “if [Aston] files and serves a response to the [Eliades] Declaration . . . then
8 (1) [Wyndham] is authorized to file and serve a reply no later than July 17, 2019 and (2)
9 this Court will conduct a hearing on the [Eliades] Declaration and response on July 30,
10 2019 at 2:00 p.m. . . .” *Id.*

11 On July 3, 2019, Aston filed a timely response to the Eliades Declaration (Wynd-
12 Mac-Adv. dkt. 132) and thereafter Wyndham filed a timely reply (Wynd-Mac-Adv. dkt.
13 134). Both parties also submitted unauthorized sur-reply declarations (Wynd-Mac-Adv.
14 dkt. 135, 136). Furthermore, in Wyndham’s unauthorized sur-reply, it alleged that Aston
15 has still failed to provide documents responsive to the Subpoenas because it failed to
16 produce its general ledger. Wynd-Mac-Adv. dkt. 136, p. 2, ¶¶ 4-7.

17 The hearing on determination of an appropriate fee award has been continued a
18 number of times (7/30/19, 8/6/19, 8/20/19, 9/24/19). At a continued hearing on
19 September 24, 2019, this Court took the matter under submission. At that hearing,
20 Wyndham also represented that Aston still had not produced an unredacted version of
21 its general ledger in response to its Subpoenas and made an oral request to compel
22 production of that document in keeping with this Court’s prior order (Wynd-Mac-Adv.
23 dkt. 120) denying Aston’s Motion to quash and this Court’s prior order (Wynd-Mac-Adv.
24 dkt. 125) compelling production. This Court took those matters under submission.

25 **2. JURISDICTION, AUTHORITY, AND VENUE**

26 This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C.
27 §§ 1334 and 1408. This court has the authority to enter a final judgment or order under
28 28 U.S.C. § 157(b)(2)(I), (J) and (O). See generally *Stern v. Marshall*, 131 S. Ct. 2594

(2011); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016) (discussing *Stern*); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (same). Alternatively, the parties have expressly or implicitly consented to this court's entry of a final judgment or order. See *Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); and see *In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013). See also Rules 7008 & 7012(b) (Fed. R. Bankr. P.); LBR 9013-1(c)(5)&(f)(3).

3. DISCUSSION

a. Wyndham is entitled to an award of \$9,425.00 in fees against Aston

As set forth in the Eliades Declaration, Wyndham seeks an award of \$9,595.50 in fees for time spent in connection with the Motion to Compel. Wynd-Mac-Adv. dkt. 128. In opposition, Aston argues that sanctions should not be imposed against it because it contends that it complied with the Subpoenas. Wynd-Mac-Adv. dkt. 132, pp. 2-5. For the reasons set forth in Wyndham's reply papers (Wynd-Mac-Adv. dkt. 134, 136), Aston's objections are overruled (except that Wyndham's reference to a 28-day time limit under Civil Rule 59(e) is deemed to refer to the 14 day time limit under Rule 9023).

In addition and in the alternative, this Court overrules Aston's objections because its only competent evidentiary support is the declaration of Glen Chaffin, which is not properly signed. A typed signature (Wynd-Mac-Adv. dkt. 132, p. 11) is not authorized by the Code, the Rules, or the Local Rules.

Aston also raises specific objections to most, if not all, of Wyndham's time entries. Based upon this Court's review of the Eliades Declaration, Aston's response, Wyndham's reply, Aston's sur-reply (which was not authorized but which this Court has considered), and Wyndham's sur-reply (also unauthorized, but which this Court also has considered), this Court partially sustains Aston's objection to the following time entry:

//

DATE	NAME	HOURS	DESCRIPTION	AMOUNT	OBJECTION	RULING
5/21/19	D.M. Eliades	1.40	Telephonic court appearances before Judge Bason on numerous matters including motion to compel ABS to produce documents	\$595.00	Lumping matters. Not proper to charge for everything.	Sustain objection in part, disallow (0.4) and reduce fees by \$170.00 to \$425.00

The remainder of Aston's objections are overruled. Based on the foregoing, Aston will be directed by separate order to pay Wyndham \$9,425.00 in fees (\$9,595.00 - \$170.00 = \$9,425.00).

b. Wyndham is entitled to additional fees for time spent drafting its reply papers

In addition to the foregoing, Wyndham requests an award of fees for time spent preparing its reply briefing. At the conclusion of this Memorandum Decision, Wyndham will be directed to lodge a proposed order granting such relief.

c. Aston must produce an unredacted general ledger

Wyndham requests an order compelling Aston to produce an unredacted general ledger. Wynd-Mac-Adv. dkt. 136. Aston initially took the position that it did not have a general ledger (see Wynd-Mac-Adv. dkt. 135, ¶¶ 3-4), but that is directly contradicted by the January 24, 2019 deposition of Glenn Chaffin in which Mr. Chaffin and Aston's counsel acknowledge the existence of a general ledger and promise to produce it. Adv. Dkt. 146, Ex. C, p. 25:7 – 27:2.

Aston also belatedly asserts that it should not be required to provide an unredacted general ledger because that would contain client information and Wyndham allegedly somehow has misused such information in the past. As set forth above, Aston has had multiple opportunities to raise this argument, and by failing to make this argument in any coherent way, supported by evidence, it has waived and forfeited that

1 argument. Even now, it offers only vague assertions, unsupported by any explanation
2 or evidence. Alternatively, Aston's denial of the existence of any general ledger, in the
3 face of its prior admission that one existed and would be produced, is an abuse of the
4 discovery process that this Court will not countenance.

5 At the conclusion of this Memorandum Decision, Wyndham will be directed to
6 lodge a proposed order directing Aston to turn over its unredacted general ledger to
7 Wyndham's counsel.

8 **4. CONCLUSION**


9 For the reasons set forth above, Wyndham is directed to lodge a proposed order
10 directing Aston to pay Wyndham \$9,425.00 in discovery sanctions. That order should
11 also set a deadline of November 19, 2019 for Wyndham to submit a supplemental
12 declaration in support of its fees incurred in connection with its subsequent work on
13 these matters, and November 26, 2019 for any response by Aston. Thereafter the
14 matter of those fees will be deemed submitted. No other briefing on fees will be
15 permitted.

16 In addition, this Court will issue another order directing Aston and its principal
17 Glenn Chaffin to produce its unredacted general ledger to Wyndham's counsel by no
18 later than November 19, 2019. That order should include a provision limiting review of
19 the general ledger to attorneys' eyes only, unless and until otherwise ordered.

20 Wyndham is directed to submit appropriate orders within four calendar days of
21 the entry of this Memorandum Decision.

22 ###

23
24 Date: November 12, 2019

25 
26 _____
27 Neil W. Bason
28 United States Bankruptcy Judge